No. 36.

Reply Brf. of Logan & Dem P. C.

Supreme Court of the United States.

Filed Oct. 13, 1894.

GEORGE F. UNDERHILL,
Plaintiff-in-Error,

vs.

JOSE MANUEL HERNANDEZ,
Defendant-in-Error.

36

BRIEF FOR PLAINTIFF-IN-ERROR IN REPLY.

POINT 1.

The record is barren of proof to show that Hernandez was a military commander acting under the authority of any government, revolutionary or otherwise. Hence, the entire argument for defendant falls and the direction of a verdict was error because Mr. Underhill had made out a *prima facie* case.

The two briefs submitted by defendant-in-error assume that Hernandez had special civil and military authority and was acting as the representative of a government. Upon this assumption the defendant claims exemption for his acts. To establish this he necessarily relies on the plaintiff's evidence which merely showed what the defendant did and what he claimed, but there is no evidence, nor could there be, as to whether his claim to be a civil and military chief acting with due authority, was well founded or not. There was no proof to show that his acts were authorized by any government of Venezuela, either established or insurgent. No commission issued by any authority was proved nor any connection between him and his forces and any other organized body.

This was necessarily so. Neither Mr. Underhill nor any of his witnesses could have any knowledge of the authority under which the defendant acted. They could only testify to what he did or to rumors they heard about him. He came with an armed rabble of different nationalities, having no distinctive uniform, national or otherwise, and by mere force took possession and control of an insignificant City of Venezuela. Might was his right. He was a free lance, responsible to no one but himself so far as the record discloses, doubtless one of a number of independent leaders of petty forces, each striving to gain the control of the country, which control Crespo, subsequently was enabled to grasp. But the record is silent on the question of his authority. His acts were arbitrary and entitled to no greater sanction so far as the evidence discloses than those of Captain Kidd on the high seas or the Buccanneer Morgan when he captured and devastated Panama. That a mob has some semblance of organization and a leader, and has possession by right of force, is no justification for acts of intimidation and oppression.

Because of this utter absence of any competent evidence connecting Hernandez with any government or organized revolutionary body (even assuming that such evidence is material, which we deny for reasons set forth in our original brief,) the whole framework of defendant's argument falls. These are preliminary facts which must be first established to sustain the defendant's contention, and the burden of such proof, as we have heretofore shown, is on the defendant.

As the evidence stands the plaintiff established his case by showing the false imprisonment and the assaults and indignities suffered by and imposed upon him by the defendant or his agents. There he had a right to rest.

He had made a case for a jury. The defendant was called upon to answer. Hence it was error for the Judge to direct a verdict, for the court necessarily had to assume that there was evidence which did not exist. The burden was upon the defendant to supply it and this he did not do.

The matter is made quite clear if we consider an illustration from our Civil War.

Suppose the case of a man who had been imprisoned by some leader during the rebellion. Such a commander could not exonerate himself for his acts by showing that he was in command of troops and assumed certain powers.

He would have to go further and show by competent evidence, either oral or documentary, that he was acting for and on behalf of either the Union or Confederate cause and by their authority. The leader of a mere band of spoilers, robbers or guerrillas, subservient to no authority, self seeking, plundering federal and confederate alike, would not secure immunity in such a suit brought by one of his victims by simply showing that he was a military leader in command of a body of armed

men and had occupied a town or place by force of arms.

The briefs submitted by the defendant-in-error are wholly based upon the assumption which we have shown to be groundless. In the brief of Mr. F. R. Coudert, Point I, assumes that the defendant was a military commander acting in behalf of the government. Point II assumed that he was acting as an official of a Sovereign or a State. Point III that he was acting in a general war in behalf of a government. Point IV makes the same assumption with respect to his acting in behalf of a revolutionary government, and Point V assumed that he was an officer of an army maintained by a government.

An examination of the brief submitted by Mr. Frederick R. Coudert, Jr., discloses that the various points made by him are predictated upon the same assumption.

Now, inasmuch as we have shown, and as the evidence discloses, that this assumption is without foundation, it appears that the arguments contained in these briefs are immaterial.

That the defendant cannot glean from the plaintiff's evidence any facts to maintain this assumption is both natural and necessary. What did Mr. and Mrs. Underhill and their witnesses know? What could they prove with regard to the foundation stone of defendant's defense? They merely knew of rumors. They were aware of what occurred and of what they suffered from the arbitrary acts of the defendant. That was all.

Suppose they were not the parties imprisoned and that this action had been brought by a stranger who had proved the defendant's unlawful acts, and that the defendant in proving his case first called Mr. and Mrs. Underhill as witnesses to prove that he was a military commander acting for

the government of Venezuela, and that they knew no more concerning this fact than the record now discloses. Would such evidence be competent for the defendant on this issue? Is this the way to establish such an issue? Is not the only competent evidence for such a defense proof of a written commission or oral proof by officers of the government itself or at least some one having some knowledge of the fact, showing that Hernandez was acting for and under the authority of the government or revolutionary body?

It thus appears that the foundation of the entire edifice of the defendant's arguments is undermined and destroyed, and that necessarily the whole superstructure must perish with it.

It is clear that the Court below was in error. The plaintiff had made out a case which required countervailing evidence to overthrow it. The jury should have been the judges of the facts. A Court can only direct a verdict in cases where the plaintiff's competent evidence, direct and cross, makes out a complete defense for defendant or fails to make out a *prima facie* case for the plaintiff.

A case peculiarly in point is *Hickman vs. Jones*, 9 Wall., 197.

In this case a verdict had been directed for two of the defendants. The plaintiff, during the Civil War, had been indicted in a Court of the Confederate States and had been imprisoned upon the charge that he had traitorously co-operated with the troops of the United States and given them aid. After the War he brought suit against the officers composing the court and some of the grand jury and others.

This court held that the Confederate Court was a nullity and in discussing the question whether

the judge was right in directing a verdict for the defendants stated as follows:

> "There was some evidence against both of them. Whether it was sufficient to warrant a verdict of guilty was a question for the jury under the instructions of the court. The learned Judge mingled the duty of the court and jury, leaving to the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error. In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court, and give it full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law. We think the exception to this instruction was well taken."

This Court, therefore, reversed the judgmen below and ordered a new trial.

In support of the above proposition the following cases were cited:

Aylwin vs. Ulmer, 12 Massachusetts, 22.
New York Fire Insurance Company, vs. Walden. 12 Johnson, 513.
Utica Insurance Company vs. Badger, 3 Wendell, 102.
Tufts vs Seabury, 11 Pickering, 140.
Morton vs. Fairbanks, Ib., 368.
Fisher vs. Duncan, 1 Hening and Munford, 562.
Schuchardt vs. Allens, 1 Wallace, 359.

See also to the same effect:

United States vs. Tillottson, 12 Wheat. 180.
Manchester vs. Ericsson, 105 U. S., 347.
Klein vs. Russell, 19 Wall., 433.
Moulor vs. Insurance Company, 101 U. S., 708.
United States vs. Chidester, 140 U. S., 49.

To authorize the direction of a verdict not only must the facts be undisputed, but the testimony must be so conclusive that a verdict in conflict with it would necessarily be set aside. *Phoenix Company vs. Doster*, 106 U. S., 30. In this case the court says:

> "The motion, at the close of the plaintiff's evidence, for a peremptory instruction for the company was properly denied. It could not have been allowed, without usurpation, upon the part of the court, of the functions of the jury. Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the

> principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion to set aside a verdict returned in opposition to it. *Greenleaf vs. Birth*, 9 Pet., 292; *United States vs. Laub*, 12 id. 1.; *Bank of the Metropolis vs. Guttschlick*, 14 id. 19; *Bevans vs. United States*, 13 Wall., 56; *Hendrick vs. Lindsay*, 93 U. S., 143."

See also *Connecticut Mutual Life Insurance Company vs. Lathrop*, 111 U. S., 619.

An instruction to find a verdict must be tested by the same rules as in the case of a demurrer to the evidence. Merrick's Executor vs. Giddings, 115 U. S., 300. In this case the Court says:

> "The instruction to find a verdict for the defendant must be tested by the same rules that apply in the case of a demurrer to evidence. *Parks vs. Ross*, 11 How., 263, 268; *Schuchardt vs. Allen*, 1 Wall , 359, 370.
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> If, therefore, the facts established, and the conclusions which they reasonably justify, do not disclose a valid cause of action against the defendant, the judgment must be affirmed; otherwise reversed."

POINT II.

The judgment of the Courts below should be reversed and the case remitted to the United States Circuit Court for the Eastern District of New York for a new trial.

LOGAN, DEMOND & HARBY,
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